In The United States Court of Federal Claims

No. 07-763C

This Opinion Will Not Be Published in the U.S. Court of Federal Claims Reporter Because It Does Not Add Significantly to the Body of Law.

(Filed: September 26, 2008)

RANDY S. ROBERTS,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

OPINION and ORDER

In this military pay case, plaintiff alleges that he was unlawfully separated from active duty and is entitled to backpay. For the reasons stated below, the court finds that his complaint is untimely under the six-year statute of limitations contained in 28 U.S.C. § 2501.

I. BACKGROUND[1]

Plaintiff, Randy S. Roberts, served in the United States Army from April 23, 1963, until January 18, 1965. During his service, plaintiff received non-judicial punishment on seven occasions for various violations of the Uniform Code of Military Justice, and was found guilty at a summary court-martial of wrongfully giving his U.S. Armed Forces identification card to a German national taxi driver. On January 18, 1965, he received an "other than honorable" discharge from the Army.

Shortly before being separated from the military, plaintiff received medical and psychological examinations. The medical officer's report, dated November 25, 1964, concluded that "[plaintiff] was and is mentally responsible, able to distinguish right from wrong and to adhere to the right, and has the mental capacity to understand and participate in board

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[1] These facts are drawn from plaintiff's complaint, and, for purpose of this motion, are assumed to be correct. *See Bell Atl. Corp. v. Twombly*, 127 S. Ct, 1955, 1965 (2007).

proceedings."[2] The examiner found that plaintiff had "no disqualifying mental or physical defects sufficient to warrant disposition through medical channels." The psychiatric report, dated December 4, 1964, found that plaintiff did not suffer from any psychiatric diseases and did not show any "evidence of psychosis, neurosis or organic brain damage." When plaintiff was discharged from active duty, he signed a statement waiving his right to a hearing before a board of officers and his right to counsel. The waiver noted that if "eliminated under the provisions of AR 635-208 [plaintiff] can receive an Undesirable Discharge and may lose many veterans rights."

On January 14, 2003, plaintiff applied to the Army Board for the Correction of Military Records (ABCMR) for correction of his military records and an upgrade of his "undesirable" discharge. On July 30, 2003, the Board denied his application because he "ha[d] failed to submit sufficient relevant evidence to demonstrate the existence of probable error or injustice." In 2005, plaintiff filed another request with the ABCMR seeking reconsideration of the 2003 decision. On April 8, 2005, the Board denied plaintiff's request because "the overall merits of [his] case [were] insufficient as a basis to amend the decision of the ABCMR." On May 2, 2006, the Board informed plaintiff that he had exhausted his administrative appeals rights within the Department of the Army.[3]

On October 31, 2007, plaintiff filed his complaint in this court alleging that he was unlawfully separated from active duty in 1965, and seeking back pay, benefits, and correction of his military records under the Back Pay Act, 5 U.S.C. § 5596. Plaintiff alleges that he was wrongfully discharged because of the racial animus of his commanding officer. He also avers that his "less than honorable" discharge stemmed from "perjured" testimony, specifically, that of the medical officer who found plaintiff psychologically competent and, therefore, unqualified for a medical discharge. On January 2, 2008, defendant filed a motion to dismiss for lack of jurisdiction pursuant to RCFC 12(b)(1), arguing that plaintiff's claims are barred by the six-year

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[2] Plaintiff filed these medical records with his complaint. As such, the court may consider them in ruling on the motion to dismiss. *See Pennington Seed, Inc. v. Produce Exchange No. 299*, 457 F.3d 1334, 1342 n.4 (Fed. Cir. 2006).

[3] Plaintiff continued to press his case with the Army after his appeals were exhausted. On June 11, 2006, he requested that the Secretary of the Army intervene and overrule the ABCMR's denial. On July 27, 2006, the Secretary reaffirmed the ABCMR's denial of plaintiff's application stating that the Board's decisions "appear appropriate and proper given [plaintiff's] record of indiscipline consisting of seven nonjudicial punishments . . . and one special court-martial conviction." This letter apprised plaintiff that his final option for relief would be in a federal court of appropriate jurisdiction. On November 2, 2006, plaintiff sued the Secretary of the Army in the District Court of Arizona, seeking compensation for damages caused by his allegedly wrongful discharge and for an upgrade of his discharge characterization of service. *See Roberts v. Harvey*, 2007 WL 1624643 (D. Ariz. June 1, 2007). On September 24, 2007, the district court dismissed the complaint for lack of subject matter jurisdiction. *See Roberts v. Harvey*, 2007 WL 2774462 (D. Ariz. Sep. 24, 2007).

statute of limitations in 28 U.S.C. § 2501. Briefing on the motion is now complete. The court deems argument unnecessary.

II. DISCUSSION

Deciding a motion to dismiss for lack of subject matter jurisdiction "starts with the complaint, which must be well-pleaded in that it must state the necessary elements of the plaintiff's claim, independent of any defense that may be interposed." *Holley v. United States*, 124 F.3d 1462, 1465 (Fed. Cir. 1997) (citations omitted); *see also Bell Atlantic*, 127 S. Ct. at 1964-65. In particular, a plaintiff bears the burden of establishing the court's subject matter jurisdiction. *Reynolds v. Army and Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988); *Hansen v. United States*, 65 Fed. Cl. 76, 94 (2005). Although *pro se* litigants are granted some leeway in the formalities of their pleadings, they are not relieved of this basic burden. *See Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *see also Ledford v. United States*, 297 F.3d 1378, 1381 (Fed. Cir. 2002) (per curiam).

The statute of limitations for claims filed in this court is contained in 28 U.S.C. § 2501, which provides: "Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." This requirement is jurisdictional, meaning that compliance with it is a condition of the government's waiver of sovereign immunity. *John R. Sand and Gravel Co. v. United States*, 128 S. Ct. 750, 753 (2008); *Pennsauken Senior Towers Urban Renewal Assocs., LLC v. United States*, 2008 WL 4323498, at *3 (Fed. Cl. Sept. 18, 2008). Under this statute, a claim accrues when "all events have occurred to fix the Government's alleged liability," and the plaintiff knew or should have known of the existence of his claim. *Martinez v. United States*, 333 F.3d 1295, 1303, 1319 (Fed. Cir. 2003) (en banc) (internal quotations omitted), *cert. denied*, 540 U.S. 1177 (2004); *see also Hart v. United States*, 910 F.2d 815, 817-18 (Fed. Cir. 1990). In military separation cases, this accrual date generally occurs on the date that the individual is discharged from the Army. *See Young v. United States*, 529 F.3d 1380, 1383 (Fed. Cir. 2008); *Martinez*, 333 F.3d at 1303. And, this is generally the case, whether or not the service member applies for relief to a corrections board. *See Chambers v. United States*, 417 F.3d 1218, 1224 (Fed. Cir. 2005), *cert. denied*, 546 U.S. 1066 (2005); *Levy v. United States*, 83 Fed. Cl. 67, 74 (2008). Accordingly, because plaintiff's backpay claim accrued on January 18, 1965, more than forty years prior to the time he filed his complaint on October 31, 2007, it appears that his case is time-barred.

Plaintiff makes several arguments as to why this is not the case. First, he avers that the principle of "equitable tolling" provides an exception to the six-year statute of limitations and thereby excuses his untimely filing. In theory, equitable tolling "preserves a plaintiff's claims when strict application of the statute of limitations would be inequitable." *United States v. Patterson*, 211 F.3d 927, 930 (5th Cir. 2000). But, just this past session, the Supreme Court specifically found, in *John R. Sand and Gravel Co.*, 128 S. Ct. at 753, that equitable tolling does not apply to the statute of limitations in section 2501. In that case, the Court examined this limitations provision and found that it is jurisdictional – "a more absolute . . . kind of limitations provision" – and, as such, not subject to "waiver" or "equitable considerations." *Id*. at 753-54. And, in particular, the Court held that this statute of limitations is not susceptible to equitable

tolling. *Id*. at 753-57; *Young*, 529 F.3d at 1384 (holding that relief under equitable tolling is foreclosed by *John R. Sand and Gravel*); *Levy*, 83 Fed. Cl. at 75 (same); *Olin v. United States*, 82 Fed. Cl. 216, 221 (2008). Accordingly, that doctrine provides plaintiff no solace here.

Plaintiff next alleges that he "was disabled from his military experience," an allegation that this court interprets as invoking the "legal disability" exception in section 2501. That exception provides that "[a] petition on the claim of a person under legal disability . . . at the time the claim accrues may be filed within three years after the disability ceases." 28 U.S.C. § 2501. This limited exception operates when a plaintiff's personal handicap "renders [him] incapable of . . . understanding the nature and effect of his acts, and of comprehending his legal rights and liabilities." *Goewey v. United States*, 612 F.2d 539, 544 (Ct. Cl. 1979). The problem for plaintiff, however, is that the window provided by this exception extends only for three years "after the disability ceases." *See Goewey*, 612 F.2d at 544; *Coon v. United States*, 30 Fed. Cl. 531, 535 (1994), *aff'd*, 41 F.3d 1520 (Fed. Cir. 1994). Yet, in this case, it appears that any disability plaintiff might have had ceased no later than January 2003, when he was lucid enough to pursue administrative relief on his claim from the ABCMR. *See Goewey*, 612 F.2d at 544; *Coon*, 30 Fed. Cl. at 535. Indeed, in his filings, plaintiff admits that by this point in time, he had responded to treatment. Thus, while under the legal disability clause, plaintiff's complaint might have been timely had it been filed prior to January 2006, in fact, it was not filed until October 31, 2007. Accordingly, even taking into account his claim that he was suffering a "legal disability," plaintiff's complaint remains untimely.

Finally, in his reply brief, plaintiff invokes the so-called "accrual suspension doctrine" by alleging that the act of perjury that led to his damages was both "concealed by the defendant" and "inherently unknowable" because he "is not at attorney." "According to the accrual suspension rule," the Federal Circuit recently stated, "'the accrual of a claim against the Untied States is suspended, for purposes of 28 U.S.C. § 2501, until the claimant knew or should have known that the claim existed.'" *Young*, 529 F.3d at 1384 (quoting *Martinez*, 333 F.3d at 1319). To achieve this suspension, the plaintiff must show that "defendant has concealed its acts with the result that plaintiff was unaware of their existence or . . . that [his] injury was 'inherently unknowable' at the accrual date" and, in such case, the statute of limitations period will not begin to run until plaintiff learns or reasonably should have learned of his cause of action. *Martinez*, 333 F.3d at 1319 (quoting *Welcker v. United States*, 752 F.2d 1577, 1580 (Fed. Cir. 1985); *see also L-3 Commc'ns Integrated Sys. v. United States*, 79 Fed. Cl. 453, 463 (2007). In *Japanese War Notes Claimants Ass'n of Philippines, Inc. v. United States*, 373 F.2d 356 (Ct. Cl. 1967), *cert. denied*, 389 U.S. 971 (1967), this court's predecessor recognized that a claim is "inherently unknowable" when there is nothing to alert one to the wrong at the time it occurs. *Id*. at 358-59; *see also Ingrum v. United States*, 81 Fed. Cl. 661, 665-67 (2008). According to the Federal Circuit, the accrual suspension doctrine is "strictly and narrowly applied." *Martinez*, 333 F.3d at 1319.

Here, plaintiff plainly felt, as of the time of his discharge in 1965, that his discharge had been unlawfully procured. Indeed, as various documents attached to his complaint attest, he allegedly experienced several incidents of racial discrimination that led to his claim that his discharge was racially motivated. Moreover, even though the allegedly perjured testimony of which plaintiff claims might not have been known to him at the time of his discharge, it remains that the facts surrounding that testimony were not "inherently unknowable," but could have been

discovered long ago. *Compare Martinez*, 333 F.3d at 1319 (discounting the application of the doctrine where a statement "simply provided [the claimant] with additional ammunition with which to pursue his claim"). Indeed, despite the challenge mounted by defendant's motion, plaintiff has not come forth with any indication as to when he first accessed the medical records of which he now complains. In short, it appears that there is no concealment or unascertainable condition warranting application of the "accrual suspension doctrine" here.[4]

III. CONCLUSION.

Accordingly, the court finds that plaintiff's complaint is barred by the statute of limitations. Defendant's motion to dismiss the complaint is **GRANTED**. The Clerk is ordered to dismiss the complaint.

IT IS SO ORDERED.

Francis M. Allegra
Judge

[4] That plaintiff is not a lawyer is irrelevant for this purpose, for the question under the suspension doctrine is not whether he knew his legal rights, but rather whether he knew or could have known the relevant facts surrounding his claim. *See United States v. Kubrick*, 444 U.S. 111, 122-25 (1979); *Catawba Indian Tribe v. United States*, 982 F.2d 1564, 1572 (Fed. Cir. 1993), *cert. denied*, 509 U.S. 904 (1993).